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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1143

RONALD PAUL NORRIS,

Petitioner

v.

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

RONALD PAUL NORRIS,

Petitioner

v.

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, Ronald Paul Norris, prays that a Writ of Certiorari issue to review the judgment of the Indiana Supreme Court in the above case.

OPINION BELOW

The opinion below is reported at 240 N.E.2d 45 and is printed in the appendix to this petition.

JURISDICTION

The judgment of the court below was entered on September 16, 1968. A timely petition for rehearing was filed and rehearing was denied on December 11, 1968. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. In the light of *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960) may a state convict and incarcerate an accused for assault and battery upon evidence including no identification of him, direct or implied, as being the perpetrator of the offense.

2. Can a defendant be held to have waived his federal right to a speedy trial by going to trial under protest after asserting such right by motion (which was overruled without a response by the State or a hearing) because the motion did not negative every defense which the state might have under state procedure to his motion for discharge.

STATEMENT OF THE CASE

The petitioner was convicted on July 10, 1967 of Aggravated Assault and Battery in the Circuit Court of Sullivan County, Indiana and sentenced to serve an indeterminate sentence of not less than one nor more than five years. Immediately prior to the petitioner's trial he filed a motion to dismiss the charges pending against him on the grounds that a year had elapsed subsequent to the last dilatory motion or action taken on his part. This motion was in writing. It was not answered. It was overruled without a hearing. During the petitioner's trial no witness identified the petitioner or indicated by his testimony that the petitioner was in the courtroom and the record of the trial contained no indication that the petitioner was present. The said denial of right to speedy trial and total absence of evidence questions were presented to the Indiana Supreme Court on appeal. On the delay of trial question the Indiana Supreme Court ruled as follows:

> "Appellant's second motion to dismiss was filed on July 7, 1967. This motion was filed more than twelve (12) months after the change of venue was perfected to Sullivan County. However there is some question about what transpired on April 6, 1967. Trial was set for this date and then reset for July 10, 1967. The record does not reveal why or at whose insistence the trial date was changed. If the defendant did not in fact contribute to the delay, it would have been a simple matter to show that he took no action contributing to the delay and showing that there was time during which the case could have been tried. This the appellant did not see fit to do. By going to trial without submitting evidence to establish the necessary facts to entitle them to a discharge, the appellants have waived their right to a prompt trial as defined by the relevant statutes." (240 N.E.2d 45, 48)

(The reference to "appellants" plural in the above-quoted portion of the lower court's decision is an inadvertence; petitioner was the sole appellant.) The total-absence-of-evidence question was not met oy the lower court in its decision and this was acknowledged in the lower court's response to the petitioner's petition for rehearing and the following determination of that question was made:

> "The appellant filed a petition for rehearing. He has alleged several grounds which he believes should cause us to reconsider our decision. After a careful study of these grounds, we feel one was not adequately covered in our opinion. The one claim of error not directly disposed of was appellant's assigned error which concerned whether or not the record was sufficient to show that appellant was present in the court room during his trial. We agree with petitioner that it is a fundamental right that an accused individual has a right to be present in the courtroom during his trial. However, we do not share the petitioner's view that it is encumbent upon the State to show that he was in fact present and that it is reversible error for it not to have done so.

> In other words, petitioner is requesting this court to reverse the conviction because it was not shown whether or not the defendant was present.

Petitioner does not believe there are any other facts in the record in this case pertinent to the issues being raised here.

REASONS FOR GRANTING WRIT

Two reasons are presented: (1) That the petitioner's right to a speedy trial was transgressed indirectly by the creation of a statutory presumption which constitutes a sham; (2) That the petitioner was denied due process because he was convicted upon absolutely no evidence linking his person with the acts being alleged and attested to.

I.

THE LOWER COURT HELD IN THIS CAUSE THAT IT WAS INCUMBENT UPON THE PETITIONER TO ESTABLISH THAT HE WAS IN NO WAY RESPONSIBLE FOR THE ONE YEAR DELAY IN HIS TRIAL AND THAT HE HAD FAILED TO DO SO BECAUSE THE TRIAL COURT HAD NOT MADE AN ENTRY STATING THE REASONS FOR ONE OF THE TRIAL POSTPONEMENTS AND THE PRESUMPTION OF REGULARITY IN TRIAL PROCEEDINGS REQUIRED THE CONCLUSION THAT THE PETITIONER HAD CAUSED THE DELAY. THIS STRETCHING OF THE PRESUMPTION OF REGULARITY REDUCED IT TO THE LEVEL OF A SHAM PROCEDURAL DEVICE FOR DISREGARDING THE CONSTITUTIONAL RIGHTS OF PETITIONER.

Rule 1-4D-3 of the Indiana Supreme Court constitutes the sole statutory implementation of the Constitutional Rights of accused persons out on bond to a speedy trial. It provides as follows:

> *Defendant on Recognizance*—No person shall be held by recognizance to answer an indictment or affidavit without trial, for a period embracing more than one (1) year continuously from the date on which a recognizance was first taken therein; but he shall

be discharged except as provided by paragraph one (1) of this rule.

The portion of Rule 1-4D-1 which is incorporated by reference in Rule 1-4D-3 and which provides for the exceptions thereto reads as follows:

> ". . . except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of the congestion of the court calendar; provided, however, that in the last mentioned circumstance, the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecution."

The lower court in this cause, the Indiana Supreme Court, rode roughshod over the above-quoted rule. This, the lower court was entitled to do because it is the author of the rule and the authority behind the rule. But the result of the aforesaid circumstance is that the holding of the lower court in this cause becomes the rule applicable to the speedy trial rights of accused persons. The holding of the lower court on this point was as follows:

> "Appellant's second motion to dismiss was filed on July 7, 1967. The motion was filed more than twelve (12) months after the change of venue was perfected to Sullivan County. However, there is some question about what transpired on April 6, 1967. Trial was set for this date and then re-set for July 10, 1967. The record does not reveal why or at whose insistence the trial date was changed. Also, the State raised the issue, in opposition to Appellant's first motion to discharge, that the prosecuting witness, Jerry Quinn, was put in a state of fear by the appellants, thereby necessitating his hasty departure. While there may or may not be any merit to the State's charges, and the resetting of the trial date could be for many reasons, we cannot say posi-

tively from the record that the appellant in any way caused any delay of his trial after the change of venue was perfected to Sullivan County . . . . The appellant made no allegation in his second motion to dismiss that he was free from contribution to the delay in any way. His motion, standing alone, is inadequate in this regard, and without evidence, or a verified allegation alleging at whose insistence this cause was delayed, we cannot say as a matter of law that appellant is entitled to be discharged under Rule 1-4D (supra). Therefore, we hold that the Trial Court was correct in its overruling of appellant's motion. This Court has not closed its eyes to the guarantees of the Sixth Amendment to the Constitution of the United States wherein the right to a speedy trial is enunciated. Indeed, our Rule 1-4D (supra) is promulgated with the furtherance of this right as its goal. However, in an individual's quest for his substantive rights, he must conform to those procedural requirements which are necessary to implement the desired goals.

The United States Supreme Court made the fol following comment on the State's promulgation of its procedural rules:

> 'The United States Supreme Court made the courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* supra; *Rogers v. Peck,* 199 U.S. 425, 434, 50 L. Ed. 256, 260, 26 S. Ct. 87; *Brown v. Mississippi,* (1936) 297 U.S. 278, 80 L. Ed. 682.'

"It is our conclusion that the appellant failed to comply with a procedural requirement, and has, therefore, failed in the procedural due process involed." (Appendix, pp. 16-18, *infra.*)

The lower court was factually correct in observing that the petitioner had "failed" to allege that he was not responsible for the April 6th delay in his motion to dismiss which was denied without a hearing, without any reasons given for the

denial and without any response by the state; but the lower court was legally incorrect in concluding that the past decisions of this Court justified its holding, as a procedural matter, that the petitioner waived his right to avail himself of his constitutional speedy trial rights because he did not examine the docket ledger of the trial court, ascertain that a trial date had been set during the preceding year and then postponed by the trial court without a given reason, and supply the reason in his motion to dismiss.[1] The said ruling of the lower court was directly contrary to the past decisions of this Court that a legislative body (which the Indiana Supreme Court is in this case by and through its rule-making power) may in general shift the burden of proof but a statute must not, under the guise of regulating procedure, operate to preclude a party from the right to present his defense to a presumed fact, *Mobile R.R. v. Turnipseed,* 219 U.S. 35, 43, 55 L. Ed. 78, 80 (1910); *Hawes v. Georgia,* 258 U.S. 1, 66 L. Ed. 431, 42 S. Ct. 204 (1922); *Luria v. United States,* 231 U.S. 9, 58 L. Ed. 101 (1913) and that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption. *Bailey v. Alabama,* 219 U.S. 219, 239, 55 L. Ed.

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[1] Actually, the record in this cause will show that the record on appeal did show precisely why the April 6, 1967 postponement took place. In the cross-examination of the State of Indiana's prosecuting witness, Gerry Quinn, it was disclosed that he was in another court in another county being committed to prison on that day:

Q. Gerry, I believe the commitment, this last commitment that was made on you to the Indiana State Farm was for a burglary there in Vigo County, is that right? A. Yes.

Q. And you pleaded guilty to second degree burglary and then since you were under the age of twenty-one the Judge of the Vigo Circuit Court sent you to the penal farm for a year, is that correct? A. Yes.

Q. That occurred on April 6, 1967? A. Yes, sir. (Transcript, pg. 217, LL. 4-13)

This fact was presented to the lower court in the petitioner's brief. lant's brief.

191, 200, 31 S. Ct. 145 (1911); *Truax v. Corrigan*, 257 U.S. 312, 324, 66 L. Ed. 254, 42 S. Ct. 124 (1921).

II.

THERE WAS ABSOLUTELY NO EVIDENCE BY WHICH THE JURY COULD HAVE LINKED THE PERSON OF THE PETITIONER WITH THE TESTIMONY AND OTHER EVIDENCE PRESENTED AT THE TRIAL. THE RECORD FAILED TO SHOW EVEN THE PETITIONER'S PRESENCE AT THE TRIAL. THERE WAS NOTHING RESEMBLING AN IDENTIFICATION OF PETITIONER IN COURT.

That portion of the lower court's decision which establishes conclusively that there was nothing resembling identification evidence of petitioner during his trial (or even establishing his presence for that matter) is set forth in the statement of the case, supra. While this Court does not consider "sufficiency-of-evidence" questions as such, it has reviewed "total-absence-of-evidence" questions where the absent evidence was vital to the proceeding from a due process standpoint.

> Just as conviction on a charge not made would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt.
>
> *Thompson v. Louisville*, 362 U.S. 199, 44 L. Ed. 2d 654, 80 S. Ct. 624 (1960)

> There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law. On the record before us we hold that the State of New Mexico deprived petitioner of due process in denying him the opportunity to qualify for the practice of law.
>
> *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1959)

It is submitted that a criminal trial before a jury in which there is absolutely no identification of the accused fails to

meet the minimal requirements of due process. In this particular case there is an added reason why those requirements were not met. If the Indiana Supreme Court's presumption that the petitioner was present during his trial is to be upheld it also must be presumed that his codefendant who was acquitted was likewise present and, with the jury, given no basis for distinguishing one from the other, and with no basis in the record for determining what effect the demeanor of the presumably present defendants may have had upon the verdict, there is likewise no basis for holding that the absence of any identification was not harmful.

CONCLUSION

For the reasons given it is respectfully submitted that the decision of the Indiana Supreme Court should be reversed upon a granting of certiorari herein and the said relief is hereby prayed for.

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Attorneys for Petitioner

APPENDIX

IN THE
SUPREME COURT OF INDIANA

[Filed Sep. 16, 1968]

RONALD PAUL NORRIS,
Appellant,

v.

No. 1267 S 147

STATE OF INDIANA,
Appellee.

APPEAL FROM THE SULLIVAN CIRCUIT COURT
HONORABLE H. RALPH JOHNSTON, JUDGE

LEWIS, C.J.

This is an appeal from a conviction of the appellant for the crime of Aggravated Assault. The appellant was tried jointly with an accomplice by a jury on Count Two of the Affidavit charging him with Aggravated Assault and Battery.

The evidence elicited at the trial reveals the following. On August 6, 1965, the prosecuting witness was riding in an automobile with four (4) other individuals. The driver of the car pulled into a tavern in Terre Haute, Indiana, ostensibly to purchase more beer. After stopping the car, the driver got out and went for the beverage. At this moment the appellant appeared and the prosecuting witness got out of the car. The two (2) men proceeded to argue over the prosecuting witness' treatment of the appellant's sister, whereupon the appellant struck the victim, knocking him to the ground and breaking his jaw. The three (3) remaining parties in the car witnessed the ensuing fight. Their stories are conflicting as to exactly what happened after the first blow, but taking the evidence most favorable to the State: the appellant hit the victim in the head with a beer bottle and struck him several times more. The victim was impaired by a broken arm which he had previously suffered.

The evidence is also conflicting as to the degree, if any, that the appellant's joint defendant, the driver of the car, aided in the fight. However, the jury chose to believe that the alleged joint defendant had gone for some beer, heard the noise accompanying the incident, and returned; but, that he did not aid the appellant. He was acquitted.

A physician testified that upon the victim's arrival at Union Hospital in Terre Haute, that he was suffering from multiple fractures of the jaw, and other injuries not within the doctor's specialty. He stated that in his opinion the victim had received more than one (1) blow, based upon his examination of the configuration of the fractures.

On appeal, the appellant raises essentially two (2) alleged errors:

1. That the evidence is insufficient to support the verdict of the jury.
2. That the Trial Court erred in overruling appellant's motion for discharge for the reason that the appellant was held for more than one (1) year on recognizance before trial, contrary to Supreme Court Rule 1-4 D-3.

The appellant's first alleged error is sub-divided into two (2) areas. The first may be stated as, "There must be testimony or other evidence linking the accused with the matters being attested to." The witnesses all testified substantially that the victim got out of the car, a fight ensued, and the victim was immediately knocked to the ground.

Secondly, appellant states that, "There must be a showing that the person in the courtroom is one and the same as the person designated in the indictment." While it is true that the record does not reveal any of the witnesses expressly pointing out the appellant in the courtroom as "the man", they did testify that they knew the appellant Ronald Norris, and that he was the man they saw fighting with the victim.

In his attack on the sufficiency of the evidence, the appellant is challenging his identification as the victim's assailant.

> "* * * The question of identity is one of fact and not of law. Therefore all evidence bearing upon the question must be submitted to the jury, and it is for the jury to determine whether it is satisfactory and trustworthy. *Craig v. State* (1908), 171 Ind. 317, 323; 86 N.E. 397; *Hendricks v. State* (1866), 26 Ind. 493, 494, 495; *Harbor v. Morgan* (1853), 4 Ind. 158, 159; 9 Am. Jur. *Burglary*, § 70, p. 274. The evidence was pertinent to the issue of identification and was properly admitted. Its weight was for the jury to determine." *Medsker v. State* (1946), 224 Ind. 587, 70 N.E.2d 182.

On appeal from a criminal conviction where the sufficiency of the evidence is challenged, the Supreme Court cannot weigh the evidence, but will consider only the evidence most favorable to the State, and the reasonable inferences that may be drawn therefrom to determine whether the jury was warranted in returning a verdict of guilty. *Gilmore v. State* (1951), 229 Ind. 359, 98 N.E.2d 677, *Flowers v. State* (1956), 236 Ind. 151, 139 N.E.2d 158.

Upon reviewing the testimony elicited at the trial, we hold that it was sufficient to establish that the appellant was the victim's assailant.

The second alleged error is based upon Supreme Court Rule 1-4D (1967), the pertinent parts of which read as follows:

> "3. Defendant on Recognizance.—No person shall be held by recognizance to answer on indictment or affidavit, without trial, for a period embracing more than one [1] year continuously from the date on which a recognizance was first taken therein; but he shall be discharged except as provided by paragraph one [1] of this rule."
>
> "* * * except where a continuance was had on his motion, or the delay was caused by his act, or

where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last mentioned circumstances, the prosecuting attorney shall make such statement in a motion for continuance not later than ten [10] days prior to the date set for trial, or if such motion is filed less than ten [10] days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor."

The affidavit was filed with the Clerk of Vigo Circuit Court on August 26, 1965. The trial was held on July 10, 1967. On the surface it would appear that the appellant was indeed, held on recognizance for more than the statutory period of one (1) year.

However, under Rule 1-4D, supra, there is the exception that where the delay is caused by the defendant, discharge is not available. *Wedmore v. State* (1957), 237 Ind. 212, 143 N.E.2d 649. Without listing all the proceedings in the record, the following are the key events:

August 26, 1965–Affidavit filed with the Clerk of Vigo County

September 21, 1965–Defendant's motion granted for continuance of arraignment to September 8, 1965.

February 28, 1966–Defendant's motion for continuance of trial until May 16, 1966

May 23, 1966–Defendant Norris failed to appear without reason and cause continued until June 1, 1966

May 27, 1966–Defendants filed an amended motion for change of venue

June 29, 1966–Venue perfected to Sullivan County and records received

November 21, 1966–State of Indiana informed Trial Court that Gerry Quinn, the prosecuting witness, was unavailable, having left his home and taken his clothing. Information was given that he had left in a state of fear. State requested a continuance.

November 21, 1966—Defendants object to the continuance and move the Court to dismiss, based on the State's failure to prosecute.

November 29, 1966—Motion to dismiss for reason appellant not tried within one (1) year, overruled and State given a continuance.

March 27, 1967—Cause set for trial on April 6, 1967

April 6, 1967—No indication in transcript as to what transpired this date.

June 14, 1967—Cause set for trial July 10, 1967.

July 7, 1967—Appellant filed motion for discharge because he had not been granted a speedy trial.

July 10, 1967—Motion overruled and trial started.

Appellant's first motion to dismiss was filed on November 21, 1966. This motion came only about five (5) months after the change of venue which was requested by the appellants had been perfected. The appellants had inaugurated the proceedings voluntarily and of their own free will. They may not now be heard to say that this delay would necessitate their dismissal. Indeed, before this change of venue, the defendants had petitioned for and had been granted continuances and also had delayed the proceedings in other ways. Therefore, we hold that the first motion to dismiss was properly overruled.

Appellant's second motion to dismiss was filed on July 7, 1967. This motion was filed more than twelve (12) months after the change of venue was perfected to Sullivan County. However, there is some question about what transpired on April 6, 1967. Trial was set for this date and then re-set for July 10, 1967. The record does not reveal why or at whose insistence the trial date was changed. Also, the State raised the issue, in opposition to appellant's first motion to discharge, that the prosecuting witness, Jerry Quinn, was put in a state of fear by the appellants, thereby necessitating his hasty departure. While there may

or may not be any merit to the State's charges, and the resetting of the trial date could be for many reasons, we cannot say positively from the record that the appellant in any way caused any delay of his trial after the change of venue was perfected to Sullivan County.

Appellant's motion to dismiss of July 7, 1967, omitting the caption and verification, reads as follows:

> "Comes now Ronald Paul Norris, and being first duly sworn upon his oath, deposes and says:
>
> 1. That he is defendant in the above entitled cause, charged with the criminal offense of Malicious Mayhem, Count I and Aggravated Assault & Battery, Count II.
>
> 2. That he did more than six months previous hereto file a motion for discharge for the reasons that he had not been granted a speedy trial under the Constitution of the United States of America, the Constitution of the State of Indiana and under the Rules of the Supreme Court.
>
> 3. That more than six months has elapsed since the ruling on said motion to discharge.
>
> 4. That he has not yet been tried on said charge.
>
> WHEREFORE, Ronald Paul Norris, defendant herein, respectfully prays the court that he be discharged in the above entitled cause, that he be released from bond, that the charge herein be dismissed and held for naught and for all other just and proper relief in the premises.

In *Durrett v. State* (1966), ___ Ind. ___, 219 N.E.2d 814, this Court construed Burns' Indiana Statutes, Anno., (1956 Repl.), § 9-1403, (which was superseded by Rule 1-4D [supra], and does not differ significantly under the facts of this case) as follows:

> "However, it is also true that a defendant seeking discharge under the statute involved [Burns' Ind. Stat. Anno. § 9-1403 (1956 Repl.)] has the burden of alleging and showing that he did not contribute to

or cause the delay. *Epps v. State* (1963), 244 Ind. 515, 192 N.E.2d 459; *State v. Beckwith* (1944), 222 Ind. 618, 57 N.E.2d 193; *Sullivan v. State (Flick v. State)* (1939), 215 Ind. 343, 19 N.E.2d 739; *Alyea v. State* (1926), 198 Ind. 364, 152 N.E. 801, 153 N.E. 775.

If the defendant did not in fact contribute to the delay, it would have been a simple matter to offer testimony showing that he took no action contributing to the delay and showing that there was time during which the case could have been tried. This the appellants did not see fit to do. By going to trial without submitting evidence to establish the necessary facts to entitle them to discharge, the appellants have waived their right to a prompt trial as defined by the relevant statutes."

See also, *State v. Miami Circuit Court of Miami County* (1968), ___ Ind. ___, 233 N.E.2d 777, wherein Rule 1-4D (supra) was construed thusly:

"This court has heretofore stated that a defendant who is charging delay in a petition for discharge under Burns' Ind. Stat. §§ 9-1402 and 9-1403 has the burden to show that the delay complained of was caused by the state and not by the defendant. *Epps v. State* (1963), 244 Ind. 515, 524, 192 N.E. 459; *Durrett v. State* (1966), 9 Ind. Dec. 111, 219 N.E.2d 814. The same burden is upon the defendant in the application of Supreme Court Rule 1-4D.

The defendant was given her opportunity to sustain this burden on October 14, 1967, at which time the court heard the evidence which was submitted on her behalf, and the trial court found that she had not sustained this burden."

There is insufficient evidence in the record from which we are able to draw a conclusion, with any degree of certainty, as to exactly what transpired after the appellant's change of venue was perfected to Sullivan County. The appellant made no allegation in his second motion to dismiss that he was free from contribution to the delay in

any way. His motion, standing alone, is inadequate in this regard, and without evidence, or a verified allegation alleging at whose insistence this cause was delayed, we cannot say as a matter of law that appellant is entitled to be discharged under Rule 1-4D (supra). Therefore, we hold that the Trial Court was correct in its overruling of appellant's motion.

This Court has not closed its eyes to the guarantees of the Sixth Amendment to the Constitution of the United States wherein the right to a speedy trial is enunciated. Indeed, our Rule 1-4D (supra) is promulgated with the furtherance of this right as its goal. However, in an individual's quest for his substantive rights, he must conform to those procedural requirements which are necessary to implement the desired goals.

The United States Supreme Court made the following comment on the State's promulgation of its procedural rules:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, supra; *Rogers v. Peck*, 199 U.S. 425, 434, 50 L.ed. 256, 260, 26 S.Ct. 87, * * *" *Brown v. Mississippi* (1936), 297 U.S. 278, 80 L.ed. 682.

It is our conclusion that the appellant failed to comply with a procedural requirement, and has, therefore, failed in the procedural due process involved.

There being no sufficient grounds for reversal presented to this Court, we affirm.

ARTERBURN, HUNTER, and MOTE, JJ., CONCUR;
JACKSON, J., CONCURS IN RESULT.

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v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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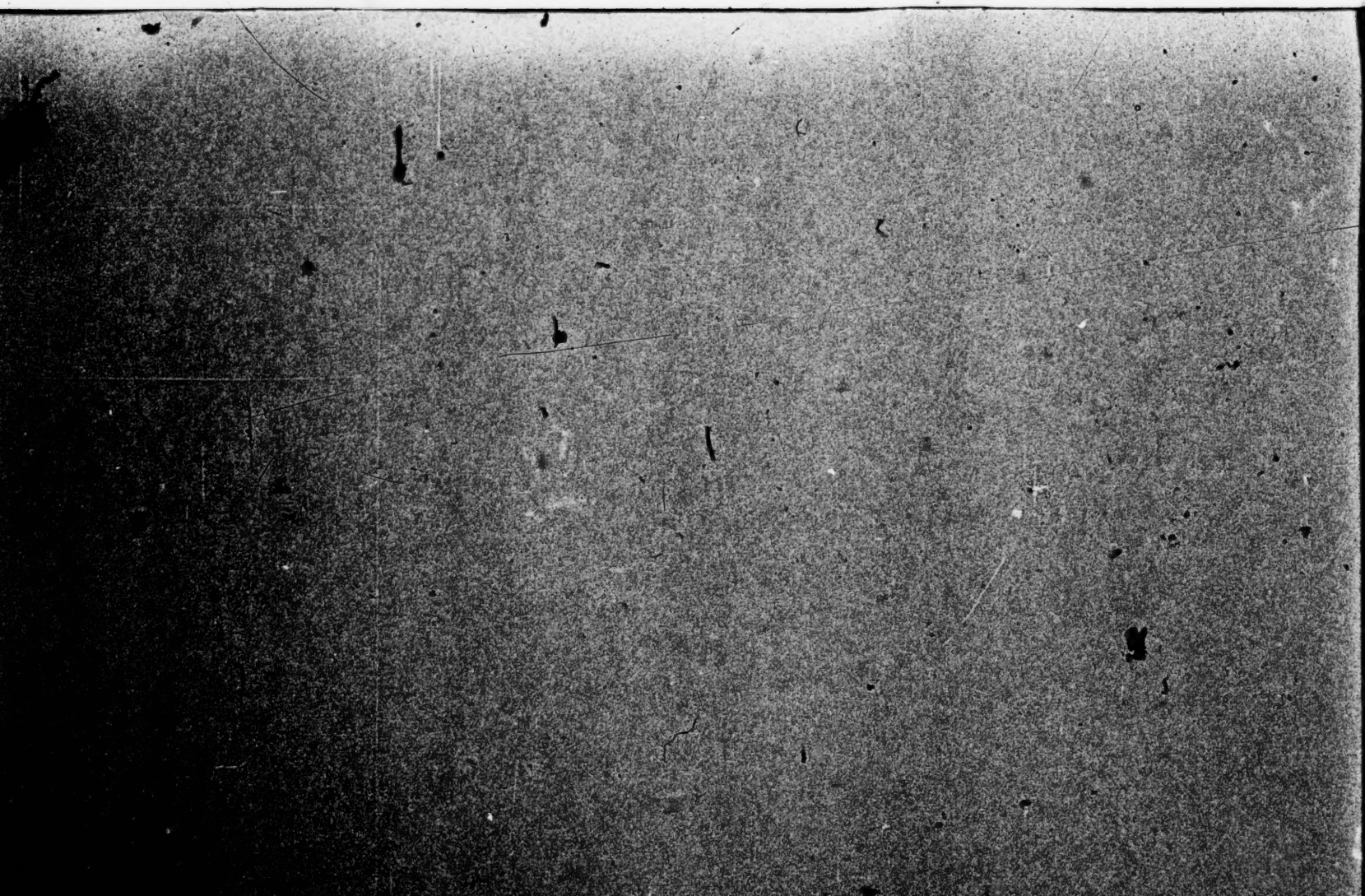

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RONALD PAUL NORRIS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I. Whether the issues raised by Petitioner were decided by the Supreme Court of Indiana on independent and adequate non-federal grounds.

II. Whether the issues raised by Petitioner raise a substantial federal question.

III. Whether Petitioner was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

IV. Whether Petitioner was sufficiently identified at his trial as the person named in the affidavit charging him with Aggravated Assault and Battery.

RULES OF THE SUPREME COURT OF THE UNITED STATES INVOLVED

RULE 19. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned

such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general consideration outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of ceritorari.

STATEMENT OF CASE

Petitioner's "Statement of the Case" is inadequate. Consequently, Respondent sets out additional fact which Respondent feels revelant to this matter.

Regarding Petitioner's identification and presence at trial, the State produced four eyewitnesses to the aggravated assault and battery. All four of those witnesses, including the victim, testified that they knew or were acquainted with Petitioner prior to the acts for which he was being tried. (R. 205, 206, 209, 228, 256, 227). They all testified that the same defendant, Petitioner, who was being tried had committed the acts constituting aggravated assault and battery. (R. 197 200, 202, 203, 206, 232-234, 260, 261, 264, 279, 280). Petitioner was present in court on the day evidence was heard at his trial. (R. 118). During the trial, the victim, during cross-examination, indicated that he knew petitioner and that the petitioner was present. (R. 211).

Regarding Petitioner's right to a speedy trial, the assault and battery occurred August 6, 1965. (A. 12) The affidavit charging Petitioner with Aggravated Assault and Battery was filed August 26, 1965. (R. 2). On September 2, 1965, Petitioner moved to continue the trial. The motion was granted. (R. 20). On May 23, 1966, the day set for trial,

Petitioner failed to appear without cause. The trial was continued. (R. 23). On May 31, 1966, Petitioner filed an amended motion for a change of venue from the county. (R. 30). The motion was granted. (R. 32). On June 29, 1966, the change of venue to another county was perfected. (R. 88). On July 10, 1967, Petitioner's trial was begun. (R. 103, 104).

SUMMARY OF ARGUMENT

This is not a proper cause for direct review by certiorari. Petitioner presents two issues for this Court's consideration, that the Indiana Supreme Court unconstitutionally applied its Rule 1-4D, regarding Petitioner's right to a speedy trial under that Rule, and that Petitioner was not identified at his trial as the person named in the affidavit charging him with Aggravated Assault and Battery.

The issues raised by Petitioner were decided by the Supreme Court of Indiana on independent and adequate non-federal grounds. The issues raised by Petitioner present no substantial federal question.

Even if Petitioner has raised a question directly reviewable by certiorari, the record is clear that Petitioner was not denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and that Petitioner was adequately identified at his trial as the person named in the affidavit.

REASONS FOR DENYING THE WRIT — ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF

INDIANA IN THIS CASE WAS BASED ON INDEPENDENT AND ADEQUATE NON-FEDERAL GROUNDS.

The issues Petitioner raises in this cause were decided by the Supreme Court of Indiana on independent and adequate state grounds. In a motion for discharge, the Indiana Supreme Court, under its Rule 1-4D, requires that the movant allege that the delay was not caused by him. In the instant cause the Court said:

> "There is insufficient evidence in the record from which we are able to draw a conclusion, with any degree of certainty, as to exactly what transpired after the appellant's change of venue was perfected to Sullivan County. The appellant made no allegation in his second motion to dismiss that he was free from contribution to the delay in any way. His motion, standing alone, is inadequate in this regard, without evidence, or a verified allegation alleging at whose insistence this cause was delayed, we cannot say as a matter of law that appellant is entitled to be discharged under Rule 1-4D 'supra.' Therefore, we hold that the Trial Court was correct in its overruling of appellant's motion." (Our Emphasis) (A. 17)

* * *

> "It is our conclusion that the appellant failed to comply with a procedural requirement, and has, therefore, failed in the procedural due process involved." (A. 18).

There is no question but that the requirements of Rule 1-4D are stricter than those held to be required by the cases interpreting the Sixth Amendment. A defendant released on recognizance must be tried within one year; a defendant in jail must be tried within six months or within fifty (50) days if he petitions for early trial.

Under both Rule 1-4D and the cases interpreting the Sixth Amendment, the delay must be caused by the government and not the defendant. Rule 1-4D requires that in his petition for discharge, the defendant must allege that he did not cause the delay. Only in this way may the defendant bring himself within the purview of the Rule. If the defendant makes such an allegation, it becomes incumbent upon the state to prove that the defendant did cause the delay. By these requirements, the Rule dictates how the matter is brought to issue and how the burden of proof is established.

If a state wishes to make a stricter requirement than the Constitution, it should be permitted to promulgate reasonable rules for its implementation. Requiring a standardized procedure assists defendants, the state and the courts in determining whether the Rule has been complied with. Clearly this serves a legitimate state interest.

This Court has long declined to review state court judgments resting on independent and adequate state grounds, because to do so would be to render advisory opinions. See *Fay* v. *Noia*, 372 U.S. 391, 428 (1963) where the Court said:

> "It is a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."

The principle of not reviewing State court judgments, resting on independent and adequate state grounds, applies to both procedural and substantive State grounds. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). Regarding State procedural grounds, in *Henry, supra*, the Court stated:

> "These cases settle the proposition that a litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with his procedural rules serves a legitimate state interest." at p. 447

Since the procedural rule, requiring Petitioner to allege the delay was not his fault, in this cause is clearly a legitimate state interest, this Court should decline direct review of its application in this cause by certiorari.

Regarding the identification of Petitioner at his trial as the person named in the affidavit the court specifically found that the State had sustained its burden of proof!

> ". . . The witnesses all testified substantially that the victim got out of the car, a fight ensued, and the victim was immediately knocked to the ground.
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> ". . . While it is true that the record does not reveal any of the witnesses expressly pointing out the appellant in the courtroom as 'the man', they did testify that they knew the appellant Ronald Norris, and that he was the man they saw fighting with the victim. (A. 12).
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> "Upon reviewing the testimony elicited at the trial we hold that it was sufficient to establish that the appellant was the victim's assailant." (A. 13).

In so holding, the lower court merely exercised sound discretion in determining the facts were sufficient to constitute an in court identification of Petitioner. The standard laid down in this cause does no more than establish a standard necessary to constitute an in court identification

of an accused. The standard established in this cause cannot be regarded as below the minimal due process requirements of the Federal Constitution, nor shocking to one's sense of justice. The establishment of such a standard is clearly a legitimate state interest.

As shown above, this court will not review State court judgements resting on independent and adequate state grounds, whether the state ground be procedural or substantive. *Fay* v. *Noia, supra; Henry* v. *Mississippi, supra.*

The standard for an in court identification established in this cause is an independent and adequate state ground, clearly serving a legitimate state interest. Consequently this Court should decline direct review of the matter by certiorari.

II

THE ISSUES RAISED BY PETITIONER PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS FOR THIS COURT TO RESOLVE.

Neither of the issues raised by Petitioner presents a special or important reason under Rule 19 of this Court, entitling him to review on a Writ of Certiorari. The claim that the Supreme Court of Indiana unconstitutional applied its Rule 1-4D, regarding Petitioner's right to a speedy trial, to the facts of this cause was decided on an independent and adequate non-federal ground as developed in Respondent's Argument, Part I. But even if not decided on non-federal grounds in the lower court, Petitioner does not make that first showing as to how he was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States; nor does Petitioner show how the delay in his trial

was in any way oppressive, purposeful or prejudicial. Consequently, petitioner's claims regarding a speedy trial present no federal question.

The claim that Petitioner was not sufficiently identified at his trial as the person named in the affidavit charging him with the crime of Aggravated Assault and Battery and of which he was convicted is actually a sufficiency of the evidence question. And as more fully developed in Respondent's Argument, Part IV, this Court does not review sufficiency of the evidence questions. It is not a federal question.

Rule 19 of the Rules of the Supreme Court of the United States regarding considerations governing review on certiorari, states that:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
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> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court.
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> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or

has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Consequently, Petitioner is not entitled to a review on a Writ of Certiorari.

III

PETITIONER'S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT WAS NOT VIOLATED.

Without waiving Respondent's position that Petitioner has not raised a substantial federal question and that the court's order was based on adequate and independent non-federal grounds, Respondent will show that Petitioner was not denied his Constitutional right to a speedy trial.

Petitioner has alleged that the Indiana Supreme Court has unconstitutionally interpreted and applied its own Rule 1-4D. This does not present a question cognizable by this Court. This Court has often held that the states must have latitude in working out their own procedural rules, and this court will only determine whether Constitutional standards have been violated. *Cooper* v. *California* 386 U. S. 58 (1967); *Ker* v. *California*, 374 U. S. 23 (1963). The question is not whether Indiana improperly applied its own Rule, but whether Petitioner was denied his Sixth

Amendment rights as they have been interpreted by this court.

The facts indicate that the assault and battery occurred August 6, 1965. The affidavit charging Petitioner with Aggravated Assault and Battery was filed August 26, 1965. Petitioner was tried on July 10, 1967. During this time, Petitioner was out of jail on bail.

The acts of Petitioner greatly contributed to the delay of which Petitioner complains. On September 2, 1965, Petitioner moved to continue arraignment. The motion was granted. On September 8, 1965, Petitioner requested additional time to employ counsel. The request was granted. On February 28, 1966, Petitioner moved to continue the trial. The motion was granted. On May 23, 1966, the day set for trial, Petitioner failed to appear without cause. The trial was continued. On May 31, 1966, Petitioner filed an amended motion for a change of venue from the county. The motion was granted. On June 29, 1966, the change of venue to another county was perfected. On July 10, 1967, Petitioner's trial was begun.

The time lapsed between the filing of the charge against Petitioner and Petitioner's trial on that charge was twenty-two (22) months. The time lapsed between the perfection of Petitioner's motion for a change of venue, the last delaying motion definitely attributable to Petitioner, and Petitioner's trial on the charge of which he was convicted was twelve (12) months. Regardless of the period of time adopted as controlling, the time lapsed was not so unreasonable in and of itself as to constitute a violation of Petitioner's right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. *United States* v. *Ewell*, 383 U. S. 116 (1966).

"Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances." *Pollard* v. *United States*, 352 U. S. 354, 361 (1957). To establish the denial of his right to a speedy trial under the Sixth Amendment, Petitioner must allege circumstances which show the delay to be oppressive or to be the deliberate act of the State. *United States* v. *Ewell, supra.* And although not a declaration of this Court, the Federal Circuit Courts of Appeal have overwhelmingly held that the delay must be shown to be prejudicial to an accused's defense.

See: *Moser* v. *United States*, 381 F.2d 363, (9 Cir. 1967)
United States v. *Jackson*, 369 F.2d 936 (4 Cir. 1966)
Hedgepeth v. *United States*, 365 F.2d (D.C. Cir. 1966)
Magee v. *United States*, 392 F.2d 187 (1 Cir. 1968)
United States v. *Feinberg*, 383 F.2d 60, (2 Cir. 1967)

Petitioner, however, alleges no circumstances to show that the delay was the deliberate act of the State, that the delay was oppressive or that the delay was in any way prejudicial to Petitioner's defense. Having failed to allege such circumstances, this Court has no basis upon which to conclude the Petitioner's right to a speedy trial guaranteed by the Sixth Amendment was violated. Thus, the Petition for a Writ of Certiorari in this cause should be denied.

IV

PETITIONER WAS SUFFICIENTLY IDENTIFIED AT HIS TRIAL AS THE PERSON NAMED IN THE AFFIDAVIT CHARGING HIM WITH AGGRAVATED ASSAULT AND BATTERY.

Without waiving Respondent's position that Petitioner has not raised a substantial federal question and that the court's order was based on independent and adequate non-federal grounds, Respondent will show that Petitioner was sufficiently identified at his trial.

Petitioner claims there was no evidence by which the jury could have linked the person of the Petitioner with the testimony and other evidence presented at the trial, that the record failed to show Petitioner's presence at the trial, and that there was nothing resembling an in court identification of Petitioner.

However, the record shows that the witnesses against the Petitioner and the victim were all acquainted with the Petitioner prior to the trial. The witnesses and victim designated Petitioner by name in their testimony during the trial. And the record shows that Petitioner was present at the trial.

It is noteworthy that Petitioner does not contend that the trial was conducted in his absence. Nor does the Petitioner contend there was any question in the mind of the judge, jury, witnesses or victim that he was not indeed the person named in the affidavit charging him with the crime of which he was convicted.

In passing upon this issue, the Supreme Court of Indiana said:

> ". . . The witnesses all testified substantially that the victim got out of the car, a fight ensued, and the victim was immediately knocked to the ground.
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> ". . . While it is true that the record does not reveal any of the witnesses expressly pointing out the appellant in the courtroom as 'the man', they did testify that they knew the appelant Ronald Norris,

that he was the man they saw fighting with the victim. (A. 12).

* * *

"Upon reviewing the testimony solicited at the trial we hold that it was sufficient to establish that the appellant was the victim's assailant." (A. 13).

Clearly, the evidence presented at trial established Petitioner's identification in court. At best, Petitioner presents a sufficiency of the evidence question. However, as Petitioner has conceded in his brief this Court does not consider sufficiency of the evidence questions. See, *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1959), dealing solely with total absence of the evidence questions. Consequently the court should decide against Petitioner on this issue.

CONCLUSION

The Petition for a Writ of Certiorari prayed for in this cause should be denied.

Respectfully submitted,
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